95-1137

Supreme Court, U.S.
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No. 95-1136

In The

Supreme Court of the United States

October Term, 1995

NACHMAN BRACH, suing in his own behalf and as representative of a class of Satmar Hasidic Jews,

Petitioner,

vs.

CONGREGATION YETEV LEV D'SATMAR, INC., HONORABLE FRANCIS D. PHILLIPS, II, DISTRICT ATTORNEY OF ORANGE COUNTY, NEW YORK, THE COUNTY OF ORANGE, NEW YORK, HONORABLE GAIL S. SHAFFER, HONORABLE ROBERT ABRAMS and HONORABLE MARK R. CHASSIN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CONGREGATION YETEV LEV D'SATMAR, INC.

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28 pp

QUESTIONS PRESENTED

1. Does Petitioner have any "right of sepulcher" which gives him a state law right of access to the cemetery?

2. Did Petitioner allege that Respondent Congregation Yetev Lev D'Satmar ("Satmar Congregation") excluded him from the cemetery as the result of any discrimination based on race, ancestry or ethnic origin?

3. Did Petitioner allege that the Satmar Congregation conspired with the other Defendants-Appellees to deprive Petitioner of a federally protected constitutional right?

4. Is a privately owned cemetery a public or quasi-public forum?

5. Did Petitioner allege the existence of a conspiracy to deprive him of his constitutional rights as the result of class-based, discriminatory animus?

6. Is the present controversy justiciable in a secular court?

PARTIES TO THE PROCEEDINGS

The parties to this case are as stated in the petition.

Congregation Yetev Lev D'Satmar, Inc. is the governing body of the Satmar Hasidic sect, and all Satmar religious, educational and social service organizations throughout the world are either affiliated with or subsidiaries of Congregation Yetev Lev D'Satmar, Inc. The subsidiaries of Congregation Yetev Lev D'Satmar, Inc. include Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc.

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STATEMENT OF THE CASE

Respondent Congregation Yetev Lev D'Satmar, Inc. ("the Satmar Congregation") is a religious corporation organized under the laws of New York in 1947 and is the governing body of the Satmar Hasidic sect. Prior to 1979, the Satmar Congregation was led by its Rebbe or spiritual leader, Rabbi Yoel Teitelbaum. Satmar is probably the largest and most important Hasidic sect, with substantial communities in the New York metropolitan area, Israel, Europe and various locations throughout the world. The headquarters of the Satmar Congregation, and its most important community, are located in the Williamsburgh section of Brooklyn. It is not contested that virtually all members of Satmar are white Jewish people of eastern European origin.

Rabbi Yoel Teitelbaum died in August 1979. Since that time, the Satmar Congregation has been led by Rabbi Moshe Teitelbaum, who was chosen as the successor to the late Rebbe by a general assembly of the membership. The Satmar Congregation owns a cemetery in Kiryas Joel, Orange County, New York, where the deceased Rebbe is buried along with many of his followers. It is not contested that title to the cemetery is held by the Satmar Congregation. Prior to 1987, and long before the acts complained of here, the cemetery was owned by Congregation Yetev Lev D'Satmar of Kiryas Joel, Inc., a subsidiary of Respondent Congregation Yetev Lev D'Satmar, Inc. [Joint Appendix (henceforth "A"), 230-231 and 233].

The cemetery is a private burial ground of the Satmar Congregation and does not sell plots to members of the congregation or to the public (A109-110). Burial in the cemetery is provided by the Satmar Congregation to members of the Satmar Congregation as a benefit of membership (A110-111). No person has ever acquired title to a burial plot in the cemetery. Neither the Complaint nor the First Amended Complaint allege

that Petitioner (or any other person) has acquired title to a plot in the cemetery, or that any person is buried there other than as a death benefit provided by the Satmar Congregation to its members.

Petitioner Nachman Brach is a supporter of a small, militant splinter group which is violently opposed to the authority of the present Rebbe. This group consists of forty-one families who reside in Kiryas Joel, in addition to Petitioner Brach, who resides in Brooklyn. After a lengthy controversy, the Satmar Congregation expelled this splinter group in February 1989 (A42, 48-49). It is not contested that the putative class consists of the members of this group. Petitioner and all members of the putative class are white Jewish people of eastern European origin and are indistinguishable from other Satmar Hasidim in race, ancestry, and appearance.

Large numbers of Satmar Hasidim gather at the graveside of the late Rebbe on the "Yahrzeit", or anniversary of his death. In August 1992 the Satmar Congregation banned the Petitioners from the cemetery on the date of the Yahrzeit, after their activities in previous years led to disturbances. On August 21, 1992, four days before the Yahrzeit, the members of the putative class commenced a proceeding in the Supreme Court, Orange County to prohibit the Satmar Congregation from denying them access to the cemetery on the Yahrzeit (A39-65). On August 24, 1994 Justice Louis Barone of the Supreme Court, Orange County denied the petition, holding that the question of access to the cemetery was a non-justiciable religious controversy (A67-68). This decision was never appealed. Petitioner Nachman Brach was not a party to this proceeding.

The Village of Kiryas Joel is an incorporated village of the State of New York and is a part of the Town of Monroe. The Village was developed in the 1970s by private investors on land

owned by them, working in cooperation with the late Rabbi Yoel Teitelbaum. Residence in the village is not limited to members of the Satmar Congregation, and the residents of the village include persons who are not members of the Satmar Congregation and even a small number of non-Jews (A110). Village officials are elected by the voters of the Village. The Village is not a party to this action, and no Village official is alleged to have been a participant in the efforts of the Satmar Congregation to bar Petitioner from the cemetery. The remaining allegations concerning the alleged links between the Satmar Congregation and the Village are irrelevant to this action. This is especially true of the alleged "tax" on new construction by the Satmar Congregation, which is in fact a contribution levied by the Satmar Congregation on its own members to support the Congregation's institutions and is not binding on persons who are not members of the Satmar Congregation, such as Petitioner. All funds collected from members of the Satmar Congregation belong to the Satmar Congregation, not to the Village of Kiryas Joel, and are used by the Satmar Congregation for its own purposes. Neither the Village nor any of its officials are parties to this action.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAD NO RIGHT TO ENTER THE CEMETERY.

The threshold question here is whether Petitioner had a property right to enter the cemetery under New York law, in default of which he had no "civil rights" to be violated. The District Court and the Second Circuit held correctly that Petitioner had failed to demonstrate any right to enter the cemetery, which is the property of the Satmar Congregation.

Petitioner claimed that he had the right to enter the cemetery under the so-called "right of sepulcher", which allegedly accrues to a person who acquires a burial plot in a public cemetery to bury a deceased relative. These rights are limited to the right of interment, the right to erect a suitable monument, and the right to see to it that the gravesite is cared for properly. *Daniell v. Hopkins*, 257 N.Y. 112 (1931); *Hammerstein v. Woodlawn Cemetery*, 194 N.Y.S. 2d 385 (Sup. Ct. N.Y. Cty. 1960).

Since the Petitioner had no right to enter the cemetery, the Satmar Congregation did not violate any federally protected right of the Petitioner, or of the members of the proposed class. Petitioner claims that his religious beliefs require him to offer prayers at the gravesite of the late Rebbe, Rabbi Joel Teitelbaum, of members of his family, and of other "persons of sacred memory" and that he has a right to access to the cemetery to exercise his religious freedom. Petitioner concedes that the cemetery is the private property of the Satmar Congregation. It is well settled under New York law that a religious congregation has the right to control access to and use of its property. *Park Slope Jewish Center v. Stern*, 491 N.Y.S. 2d 958 (Sup. Ct. Kings Co. 1985), *rev'd in part*, 128 A.D. 2d 847, 513 N.Y.S. 2d 767 (2d Dept. 1987).

The law recognizes two types of graveyards, public and private. The basis for the distinction is that burial in a public cemetery is open to members of the general public who wish to purchase burial plots and that burial in a private cemetery is limited to a family or to a small portion of the community. *Terry v. Elmwood Cemetery*, 307 F. Supp. 369, 370 (N.D. Ala. 1969). The cemetery at issue here is a private cemetery. Burial in the cemetery is limited to members of the Satmar Congregation who are buried there as a death benefit provided by the Satmar Congregation to its members. Residents of the Village of Kiryas Joel are not eligible for burial in the cemetery unless they are

members of the Satmar Congregation. The Satmar Congregation does not sell burial plots in the cemetery, either to the general public or to its own members. No person buried in the cemetery has a deed to a burial plot, and none of the Petitioners (or anyone else) has a deed which entitles them to be buried in the cemetery. The cemetery is limited to a small portion of the community as defined by *Terry* and is thus a private cemetery.

There is little or no case law construing the rights of deceased persons and their heirs with respect to a private cemetery. However, Petitioner would not have a right of access to the cemetery even if it was a public cemetery. The Courts have held that a deed for a plot in a public cemetery does not convey title to the plot but merely a right in the nature of an easement or license to be buried in the plot. *Daniell v. Hopkins*, 257 N.Y. 112, 117 (1931); *Sockel v. Degel Yehudo Cemetery Corp.*, 268 A.D. 2d 207, 208, 49 N.Y.S. 2d 176 (1st Dept. 1944); *Hammerstein v. Woodlawn Cemetery*, *supra*, 387. This easement or license is limited to the right of interment and the right to erect a suitable monument and to care for the plot. *Hammerstein*, *supra*; *Fromer v. Shientag*, 16 Misc. 2d 953, 189 N.Y.S. 2d 937, 940-41 (Sup. Ct. N.Y. Cty. 1959). In the present action, there is no issue concerning the exercise of the right of interment or of the right to erect a monument, and there is no allegation that the alleged gravesites of Petitioner's kin are not being cared for properly.

The New York courts have upheld the right of cemeteries to regulate the use of the right of interment and the right to erect a monument, and have held that the exercise of these rights is subject to the rules and regulations of the cemetery administration. *Daniell*, *supra*. In *Biondo v. Church of the Immaculate Conception*, 102 A.D. 2d 809, 476 N.Y.S. 593 (2d Dept. 1984), the Court upheld the right of the cemetery to deny the Petitioner permission to plant a tree by his wife's gravesite. In *Ez Achaim Society, Inc. v. Cohen*, 181 N.Y.S. 2d 717, 719 (Sup.

Ct. Bronx Cty. 1958), the Court upheld the right of the cemetery to prohibit monuments containing improper and offensive inscriptions.

The case law set forth above demonstrates that the easement or license granted by a deed to a public cemetery would not give Petitioner the rights which he claims have been infringed. Even if he owned deeds to the plots where he claims that his relatives are buried, he would have the right only to erect a monument over the grave and to arrange for the care of the gravesite. The alleged right of sepulcher would not grant Petitioner the right to pray or to conduct religious services at the gravesite without the permission of the cemetery administration. Petitioner certainly does not have a right to do so in a private cemetery where he has not acquired any easement or license of any type.

Moreover, the supposed right of sepulcher does not give the Petitioner the right to worship at the gravesite of the late Rebbe or of other so-called "persons of sacred memory." The real purpose of this action (and of the previous litigation in state court by members of the proposed class) is to obtain access to the gravesite of the late Rebbe. Petitioner has no property right, by easement, license, or otherwise, to access to the gravesite of the late Rebbe. In the absence of any right based on property rights, the District Court acted correctly in dismissing the complaint.

II.

THE FIRST AMENDMENT DOES NOT GIVE PETITIONER A RIGHT OF ACCESS TO THE CEMETERY.

On appeal to the Second Circuit, Petitioner claimed for the first time that his First Amendment right of free exercise of religion required the Satmar Congregation to allow him access

to the cemetery. No case law has been cited to support this novel proposition. A claim based on free exercise of religion requires state action impinging on a person's right to practice their religion, not the actions of private parties such as the Satmar Congregation. *St. German of Alaska Eastern Orthodox Catholic Church v. United States*, 840 F.2d 1087 (2d Cir. 1988).

In *Lyng v. North Indian Cemetery Protective Association*, 485 U.S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 1319, this Court rejected a claim by three American Indian tribes that the construction of a proposed road in a "sacred area" violated the free exercise of religion. The Court found not only that state action was required, but that plaintiffs had to demonstrate that the proposed government action coerced them to violate their religious beliefs. *Lyng*, 108 S. Ct. at 1325. Similarly, *Pillar of Fire v. Denver Urban Renewal Authority*, 509 P.2d 1250 (Sup. Ct. Colo. 1973) involved state action (the condemnation of a historic church). Petitioner has not cited any case in which any court held that the First Amendment grants anyone the right to enter private property for the purpose of conducting religious ceremonies, nor has the appellee's research revealed any such cases.

Petitioner asks this Court to create a doctrine that a religious organization cannot deny access to its private property to any person who desires to worship at a so-called shrine. A ruling of this nature would permanently deprive religious organizations of the right to control access to their property, not only cemeteries but also churches, synagogues, religious schools and any other type of property. This would have a far-ranging impact not only on the parties to this action but on all religious organizations of any denomination. The ruling sought by Petitioner would dictate that the Catholic Church could not control access to the relics and gravesites of its saints, or that the Mormon Church would be forced to open its temple in Salt Lake City to non-Mormons.

Petitioner has not cited any authority which supports his position that he has a right to conduct prayers or any other activities in the cemetery. This is because there is no such authority, and existing case law supports the rights of the Satmar Congregation. This Court should deny the petition.

III.

PETITIONER DID NOT ALLEGE A VIOLATION OF 42 U.S.C. § 1982.

Petitioner alleges that the Satmar Congregation violated his civil rights in violation of 42 U.S.C. § 1982. Until recently the courts held that this statute applied solely to discrimination based on race and color. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968); *Weiss v. Willow Tree Civic Association*, 467 F. Supp. 803 (S.D.N.Y. 1979). In 1979 this court held that 42 U.S.C. § 1982 was "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics," and that Jews were a class protected by the statute. *Shaare Tefila Congregation, et al. v. Cobb, et al.*, 481 U.S. 615, 617, 107 S. Ct. 2019, 2022, 95 L. Ed. 2d 594 (1979).

Petitioner has not alleged that he is the victim of discrimination based on ancestry or ethnic characteristics. There is no allegation that the Petitioner was expelled for any discriminatory reason. Petitioner concedes that he and the members of the putative class were expelled from the Satmar Congregation as a consequence of an internal quarrel within the sect, and not on the basis of any discriminatory intent.

The statute prohibits actions directed at interfering with the

property rights of Jewish people as a class for discriminatory reasons. In *Shaare Tefila, supra*, this Court upheld a claim by a synagogue and its members against certain non-Jewish individuals who defaced the synagogue building with anti-Semitic graffiti. The Court held that the statute was intended to apply to conduct motivated by racial or ethnic prejudice. In *Emanuel v. Barry*, 724 F. Supp. 1096 (E.D.N.Y. 1989), the court held that a Jewish family could maintain an action under 42 U.S.C § 1982 against two non-Jews who set their property on fire due to anti-Semitic animus. In *LeBlanc-Sternberg v. Fletcher, et al.*, 781 F. Supp. 261 (S.D.N.Y. 1991) the court upheld a claim by Orthodox Jews against the Village of Airmont and the Airmont Civic Association for actions which were intended to exclude Orthodox Jews from the village.

The Second Circuit has held, however, that a purely religious dispute, not motivated by anti-Semitic animus, is not within the reach of 42 U.S.C. § 1982. In *Jews for Jesus, Inc. v. Jewish Community Relations Council of New York, Inc.*, 968 F.2d 286 (1992), several Jewish organizations threatened to boycott a hotel unless it canceled its agreement to accommodate a convention held by the "Jews for Jesus" sect, a Christian missionary organization which represents itself to be a Jewish sect that adheres to the beliefs of Christianity. The Second Circuit held that there was no cause of action under 42 U.S.C. § 1982 because there was no discrimination based solely on the ancestry or ethnic characteristics of the Plaintiffs-Appellants, and that the real controversy was based on allegedly deceptive practices used by the Plaintiffs-Appellants. *Id.* at 291. The Second Circuit had previously held that discrimination based on race, ancestry or ethnic characteristics is a necessary element of a claim under 42 U.S.C. § 1982. *Zemsky v. City of New York, et al.*, 821 F.2d 148 (2d Cir. 1987). This Court should deny certiorari for the same reasons.

IV.

PETITIONER DID NOT STATE A CLAIM UNDER 42 U.S.C. § 1983.

The First Amended Complaint below attempted to plead a claim against the Satmar Congregation under 42 U.S.C. § 1983. The defendant in an action under 42 U.S.C. § 1983 must be either an officer of the state, or a private person acting in conspiracy with officers of the state, acting to deprive the Petitioner of a federally protected right. *Adickes v. Kress & Co.*, 398 U.S. 144, 150, 90 S. Ct. 1598, 1604, 26 L. Ed. 2d 142 (1970); *United States v. Price*, 383 U.S. 144, 150, 86 S. Ct. 1152, 16 L. Ed. 2d 267 (1966). Petitioner alleged that the Satmar Congregation was somehow a "political functionary" of the State of New York, based on the theory that the Satmar Congregation was "inextricably intertwined" with the Village of Kiryas Joel. First Amended Complaint, paragraph 24 (A138). The basis for this theory was the allegation that the elected officials of the Village of Kiryas Joel were members of the Satmar Congregation and that the Satmar Congregation used its political influence in the community to cause them to be elected. Even if this allegation is true, it does not make the Satmar Congregation a political functionary of the state. The Satmar Congregation is, of course, a religious corporation and a private entity.

Petitioner alleges that the Satmar Congregation has a symbiotic relationship with the State of New York as defined in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961). The purpose of the symbiotic relationship test is to prevent a government agency from escaping liability for state action by delegating an essentially public function to a private party. *Evans v. Newton*, 382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. 2d 373 (1966), *cited in Atkinson v. B.C.C. Associates, Inc.*, 829 F. Supp. 637, 645 (S.D.N.Y. 1993). In cases

involving admittedly private institutions (such as the Satmar Congregation) the "plaintiff has the burden of showing 'the State is *responsible* for the specific conduct of which the plaintiff complains' (emphasis in original)." *Atkinson, supra*, at 645, *citing Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 2786, 73 L. Ed. 2d 534 (1982).

Petitioner did not shown that the state is responsible for the conduct of the Satmar Congregation. On the contrary, the acts complained of were alleged to have been instigated by the leadership of the Satmar Congregation, including the present Rebbe, Rabbi Moshe Teitelbaum, and his advisors. First Amended Complaint, paragraph 31 (A140). There was no allegation that the decision to bar Petitioner from the cemetery was made pursuant to a rule of conduct imposed by the state or by a person for whom the state is responsible, as required by *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937, 102 S. Ct. 2744, 2754, 73 L. Ed. 2d 482 (1982).

Petitioner also failed to plead any facts from which a symbiotic relationship may be inferred. The Village of Kiryas Joel is not a party to this action. The Satmar Congregation has no direct control over the village government other than through its political influence as the religious group to which the overwhelming majority of Village residents belong. None of the acts complained of are alleged to have been committed by the Village authorities. First Amended Complaint, paragraphs 33-34 and 43 (A141-142, 146). Whatever the situation may or may not be in the Village, the Village is not alleged to have been an actor in the present controversy.

The numerous allegations made about practices allegedly imposed by the Satmar Congregation in Kiryas Joel are irrelevant to the present controversy. All of these rules, including the alleged decree that persons building houses in Kiryas Joel

contribute to the Satmar Congregation, are binding only on members of the congregation. These contributions are not a tax of the Village, and the funds raised thereby belong to the Satmar Congregation and are not public funds of the Village. The population of the Village includes persons who are not members of the Satmar Congregation and a small number of non-Jews. None of these persons are subject to any of the rules of, or are required to make any contribution to, the Satmar Congregation.

Petitioner also failed to establish that there was a conspiracy to violate his civil rights. Petitioner alleges that the Satmar Congregation 'conspired' with the state police to cause the police to bar him from the cemetery. The Satmar Congregation had the right to bar Petitioner from the cemetery, and consequently had the right to request that the police stop Petitioner from entering the cemetery. This Court has held that "a private parties' mere invocation of state legal procedures [does not] constitute 'joint participation' or 'conspiracy' with state officials satisfying the Section 1983 requirement of action under color of state law." *Lugar, supra*, 457 U.S. at 939 n. 21, 102 S. Ct. 2744 n. 21, *cited in Crist v. Village of Larchmont*, 797 F. Supp. 309, 314 (S.D.N.Y. 1992). *See also, Doe v. Smith*, 704 F. Supp. 1177 (S.D.N.Y. 1988).

Petitioner's claim under 42 U.S.C. § 1983 is based on the alleged threat of false arrest, which requires an arrest made without probable cause. Petitioner claims that the cemetery was public or quasi-public property and that the Satmar Congregation had no right to threaten him with arrest. The cases cited above demonstrate that the cemetery is private property and that Petitioner had no right to enter the cemetery.

The courts have held that furnishing a person's name and description to the police is not a violation of 42 U.S.C. § 1983, even if it causes the person's arrest. *Doe v. Smith, supra*; *Newman*

v. Bloomingdale's, 543 F. Supp. 1029 (S.D.N.Y. 1982); *McKinney v. George*, 556 F. Supp. 645 (N.D. Ill. 1983); *Gilbert v. Feld*, 788 F. Supp. 854 (E.D. Pa. 1992). The facts in *Doe*, *supra*, are analogous to those in the present action. In *Doe* the plaintiff alleged that a criminal complaint against him was false and malicious. The court held that this failed to state a claim under 42 U.S.C. § 1983. Similarly, in *Newman* the Petitioner alleged that the defendant conspired with the local police department to cause the police to arrest and charge any person whom the defendant accused of shoplifting.

The First Amended Complaint alleged in conclusory terms that the Satmar Congregation conspired with the police to bar him from the cemetery, but failed to state how the Satmar Congregation violated his rights by giving his name to the police, or how the police became parties to a conspiracy simply by performing their duties as police officers. The courts have consistently held that claims under 42 U.S.C. § 1983 must be pleaded with particularity. *Fine v. City of New York*, 529 F.2d 70, 73 (2d Cir. 1975); *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977); *Doe*, *supra*; *Peavey v. Polytechnic Institute of New York*, 775 F. Supp. 75, 77 (E.D.N.Y. 1991). The First Amended Complaint does not set forth the Petitioner's alleged claim under 42 U.S.C. § 1983 with particularity and was properly dismissed.

V.

THE CEMETERY IS NOT A PUBLIC OR QUASI-PUBLIC FORUM.

Petitioner claimed below (in an attempt to state a claim under 42 U.S.C. § 1983) that the cemetery is a public or quasi-public forum within the meaning of *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 2d 265 (1946) and various other cases. The basis for this claim was that the Satmar Congregation

permits persons who are not members of the Satmar Congregation (other than Petitioner and the members of the proposed class) to visit the cemetery.

In *Marsh v. Alabama* this Court held that the streets of a company town were a public forum, since they were open to the general public without restriction. In particular, *Marsh v. Alabama* involved a business district located on company property which the company opened to the general public for profit. This Court held that "the more an owner, *for his advantage*, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it (emphasis added)." *Id.* at 506.

Petitioner concedes that the Satmar Congregation does not open the cemetery to the general public without restriction. The cemetery is enclosed, and persons entering the cemetery are subject to restrictions concerning their dress and conduct in the cemetery. The public does not enjoy unrestricted access to the cemetery, unlike a public street where the public has access at any time and for any lawful purpose. Moreover, the Satmar Congregation does not derive any benefit from the public which visits the cemetery, unlike the owner of the company town which made a profit from the activities of the company-owned business district. In this respect, the cemetery is not different from a synagogue owned by the Satmar Congregation, which the public would be permitted to enter for certain limited purposes but not without restriction or without the permission of the Satmar Congregation.

The other cases cited by Petitioner actually support the position of the Satmar Congregation. In *Lloyd Corp. v. Tanner*, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972), the respondents claimed that a shopping mall was the "functional

equivalent of a business district" within the meaning of *Marsh v. Alabama*. The court held that the owners of the shopping center did not assume or exercise municipal functions, as in the case of the company town, and that they had the right to bar the respondents from distributing handbills. *Lloyd* at 551.

Crist v. Village of Larchmont, 797 F. Supp. 309 (S.D.N.Y. 1992) also strongly supports the position of the Satmar Congregation that the cemetery is not a public forum. In *Crist* the court rejected Petitioner's argument that the church was a public forum because it hosted a fund-raising event for an abortion-rights organization. Similarly, in *People v. Leonard*, 62 N.Y. 2d 404, 477 N.Y.S. 2d 111, 465 N.E. 2d 831 (1984), the New York Court of Appeals upheld the right of the State University of New York to declare the defendant *persona non grata* on its campuses, although the case was dismissed on other grounds. There is no basis for Petitioner's claim that the cemetery is a public forum.

VI.

PETITIONER DID NOT STATE A CLAIM UNDER 42 U.S.C. § 1985.

Petitioner sought relief under 42 U.S.C. §§ 1985(2) and (3). No facts were alleged in support of any claim that the defendants conspired to deter any person from appearing or testifying in court or to obstruct court proceedings within the meaning of 42 U.S.C. § 1985(2). The remaining claim under 42 U.S.C. § 1985(3) alleged that the defendants conspired to deprive Petitioner of his right to exercise his freedom of religion.

A claim under 42 U.S.C. § 1985(3) requires a showing of a conspiracy to violate Petitioner's constitutional rights based on racial or otherwise class-based, discriminatory animus. *Griffin v. Breckenridge*, 403 U.S. 88, 97, 91 S. Ct. 1790, 1796, 29 L. Ed.

2d 338 (1971); *Jews for Jesus, Inc. v. Jewish Community Relations Council, Inc., supra*, 291; *Traggis v. St. Barbara's Greek Orthodox Church*, 851 F.2d 584, 586-87 (2d Cir. 1988); *Herrman v. Moore*, 576 F.2d 453, 457 (2d Cir. 1978); *Peavey, supra*, at 78. Petitioner did not allege that there was a conspiracy to violate his rights, or that he is the victim of any class-based, discriminatory animus.

The First Amended Complaint [paragraph 44 (A146-147)] alleged in conclusory terms that the Satmar Congregation, the County of Orange and the District Attorney conspired to deprive him of his rights. There were no allegations of any conspiratorial intent or of any class-based animus on the part of the county and the District Attorney. Petitioner may not assert a claim under 42 U.S.C. § 1985(3) which alleges that only one party acted with the intent to deprive him of his rights. *Girard v. 94th Street and Fifth Avenue Corporation*, 530 F.2d 66, 70 (2nd Cir. 1975).

Petitioner did not allege that the Satmar Congregation acted with any class-based, discriminatory intent. Petitioner admits that this controversy arose from his refusal to accept the authority of the present Rebbe and was not based on any discriminatory animus. *See* paragraphs 26-27 the First Amended Complaint (A138-139). Petitioner and his supporters do not constitute a class within the meaning of 42 U.S.C. § 1985(3). The purported class alleged by Petitioner is a "class" comprised of Satmar Hasidim who refuse to recognize the authority of Rabbi Moshe Teitelbaum as the Rebbe, and does not exist as a group that is distinct from other Satmar Hasidim.

The courts have held that the requirement of a class-based, discriminatory animus is analogous to the requirement of discrimination on the basis of race, ancestry and ethnic origin under 42 U.S.C. § 1982. *Jews for Jesus, supra*, at 292; *Emanuel v. Barry, supra*, at 1101; *Neustein v. Ohrbach*, 732 F. Supp. 333,

344 (E.D.N.Y. 1990). Private malice and political controversies are not actionable under 42 U.S.C. § 1985(3). *Herrman, supra*, at 457; *Neustein* at 344. As the District Court correctly observed, this would "mean that any internal dispute between members of a religious organization could escalate into a civil-rights suit for religious discrimination." Memorandum and Order, page 17 (A263). Since Petitioner failed to state facts which allege either a conspiracy to violate his rights or an act made on the basis of class-based, discriminatory animus, the District Court acted correctly in dismissing the claims under 42 U.S.C. § 1985(3).

VII.

THIS CONTROVERSY IS NOT JUSTICIABLE.

The judge in the state court proceeding in Orange County, New York held that the claims made by the members of the putative class required the court to delve into religious questions which were not justiciable in a secular court. Petitioner was not a party to that proceeding, but the same rule of law applies to this action.

This Court held in *Jones v. Wolf*, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979), that the First Amendment "prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." *Id.* at 602, 99 S. Ct. at 3024-25. This Court also held that a civil court could determine such disputes only to the extent that it could do so through the application of neutral principles of law and without inquiry into religious questions. *Id.*

Congregation Beth Yitzhok v. Briskman, 566 F. Supp. 555 (E.D.N.Y. 1983) is remarkably similar to the present controversy. The defendants in *Congregation Beth Yitzhok* were members of the Skole Hasidic sect who refused to recognize the

succession of the grandson of the previous Rebbe after the previous Rebbe died in 1979. The plaintiff congregation sued these individuals to obtain property seized by the dissident faction. The Court held that it could not determine the controversy by reference to neutral principles of law as required by *Jones v. Wolf*. Instead, the Court held that "in cases involving a dispute between two or more religious factions, the Court must look beyond the allegations of the complaint to ascertain what lies at the heart of the controversy." *Congregation Beth Yitzhok, supra*, at 558, *citing Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 73 S. Ct. 143, 97 L. Ed. 2d 120 (1952).

Petitioner concedes that this controversy arose from his refusal to accept the authority of the present Rebbe and the institutions of the Satmar Congregation. The secular courts cannot determine the present controversy without delving into the factional dispute which led to Petitioners expulsion from the Satmar Congregation. These matters cannot be resolved by reference to neutral principles of law. The District Court did not reach this question, holding that it was unnecessary to make a ruling when there were other grounds to dismiss the complaint. Memorandum and Order, page 17n (A263-264).

If this Court were to reverse the decision of the courts below, the District Court would be forced to determine whether Petitioner had the right to contest the succession of the present Rebbe, whether the Satmar Congregation had the right to expel Petitioner under the laws of the Jewish religion and the practices of the Satmar Hasidic community, and questions pertaining to the internal discipline of the Satmar Congregation. These questions cannot be separated from the controversy concerning access to the cemetery.

The courts have consistently held that religious sects have

the right to discipline or expel members, and that expulsion is not an actionable tort. *Paul v. Watchtower Bible and Trust Society of New York, Inc.*, 819 F.2d 875 (9th Cir. 1987), *cert. denied*, 484 U.S. 926, 108 S. Ct. 289, 98 L. Ed. 2d 249. The courts have specifically upheld the right of a Hasidic Jewish community to expel its members. *Grunwald v. Bornfreund*, 696 F. Supp. 838 (E.D. N.Y. 1988).

The present controversy is not justiciable in a civil court. The dispute is heavily laden with religious questions and cannot be determined without resolving these questions. The Court should affirm the order of the District Court on this ground as well as on the others set forth herein.

CONCLUSION

For the reasons set forth above, the Court should deny a writ of certiorari, together with such further and different relief as the Court may deem just and proper.

Respectfully submitted,

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